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**Citation for published version:**

Hogg, M 2012, 'Liability for Improperly Rejected Contract Tenders: Legitimate Expectations, Contract, Promise and Delict', *Edinburgh Law Review*, vol. 16, no. 2, pp. 246-53.  
<https://doi.org/10.3366/elr.2012.0105>

**Digital Object Identifier (DOI):**

[10.3366/elr.2012.0105](https://doi.org/10.3366/elr.2012.0105)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

Edinburgh Law Review

**Publisher Rights Statement:**

©Hogg, M. (2012). Liability for Improperly Rejected Contract Tenders: Legitimate Expectations, Contract, Promise and Delict. *Edinburgh Law Review*, 16(2), 246-53doi: 10.3366/elr.2012.0105

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## Analysis

EdinLR Vol 16 pp 224-229

### *Axa General Insurance Ltd v Lord Advocate*

In *Axa General Insurance Ltd and others v Lord Advocate and others*,<sup>1</sup> seven Supreme Court justices unanimously rejected a challenge by four insurance companies to the validity of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009, an Act of the Scottish Parliament (“ASP”) which confers a right of action in damages for asymptomatic pleural plaques and other asbestos-related conditions. The Act reversed (retrospectively as well as prospectively) in Scots Law the effect of the House of Lords’ decision in *Rothwell v Chemical and Insulating Co Ltd*,<sup>2</sup> which held that pleural plaques did not constitute an actionable injury.

By the time the case reached the Supreme Court, there were two grounds of challenge:<sup>3</sup> first, that the Act breached the insurers’ rights under article 1 protocol 1 of the European Convention on Human Rights (“A1P1”) and was therefore outwith the Scottish Parliament’s legislative competence;<sup>4</sup> and, second, that it was irrational at common law. Both grounds had been emphatically rejected by the lower courts,<sup>5</sup> and, in my view, were never likely to be any more successful in the Supreme Court, not least because of its recent difficult relationship with the Scottish Government. Nevertheless, *Axa* must be regarded as the most important Scots public law case of recent years. Not only does it settle the long-running controversy over the status of ASPs and their susceptibility to review at common law, it also effects a long overdue liberalisation of the law of standing. Further, it contains interesting dicta on the justifiability of retrospective interferences with Convention rights, and adds to the growing body of authority on “common law constitutionalism”.

1 [2011] UKSC 46, 2011 SLT 1061.

2 [2007] UKHL 39, [2008] AC 281.

3 A third ground, based on article 6 of the European Convention on Human Rights, was rejected at first instance and not renewed on appeal.

4 Scotland Act 1998 s 29(2)(d).

5 *Axa General Insurance Ltd v The Lord Advocate* [2010] CSOH 2, 2010 SLT 179; *Axa General Insurance Ltd v The Lord Advocate* [2011] CSIH 31, 2011 SC 662.

### A. THE PROPERTY RIGHTS CHALLENGE

Although the insurers were not directly affected by the 2009 Act, the Supreme Court accepted that there had been an “interference” with their possessions in terms of A1P1, since it was they who would bear most of the costs of meeting successful damages claims. The key issue, then, was whether the interference was justified. In making this assessment, the Strasbourg court accords a wide margin of appreciation to states: legislative judgments about when property rights must yield to the public interest will be respected unless they are “manifestly without reasonable foundation”.<sup>6</sup> On this test, the Supreme Court held that the 2009 Act did constitute a justifiable interference. In correcting what it perceived to be the social injustice caused by *Rothwell*, the Scottish Parliament was pursuing a legitimate aim; and the impact on the insurers was not disproportionate, notwithstanding that there were other potential ways of addressing that injustice, such as the limited, publicly-funded compensation scheme established in England and Wales.

However, the Supreme Court was more troubled by the legislation’s retrospective nature than the lower courts had been. Lord Reed’s judgment in particular contains a useful survey of the Strasbourg court’s treatment of retrospectivity, as regards both the lawfulness and the proportionality of interferences with Convention rights.<sup>7</sup> Ultimately, though, the justices regarded the Act as involving only a limited degree of retroactivity, since prior to *Rothwell* insurers had routinely accepted liability for pleural plaques, and that case itself could conceivably have been decided differently. In effect, the Act was performing a remedial function, in preserving the *status quo* which existed before *Rothwell*, of the kind that Strasbourg would accept as legitimate. Nevertheless, the clear implication was that, had the *Rothwell* position been established when the relevant insurance contracts were entered into, the 2009 Act would not have been regarded as justified.<sup>8</sup>

### B. REVIEW AT COMMON LAW

Strictly speaking, it was unnecessary for the Supreme Court to determine the issue of whether and, if so, to what extent ASPs are reviewable at common law, since the appellants had conceded that if the legislation was proportionate under A1P1 the irrationality challenge was bound to fail. Nevertheless, the Court thought it desirable to resolve the point given its constitutional importance. According to Lord Hope, “[i]t goes to the root of the relationship between the democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of that relationship.”<sup>9</sup>

The resolution of this issue turns, essentially, on the constitutional status of the Scottish Parliament. Should it be understood as a *delegated* legislator, akin to ministers and local authorities making subordinate legislation, or as a political equal

<sup>6</sup> *James v United Kingdom* (1986) 8 EHRR 123 at para 46.

<sup>7</sup> *Axa* at paras 116-134.

<sup>8</sup> See para 40 per Lord Hope, para 81 per Lord Brown and para 96 per Lord Mance.

<sup>9</sup> Para 42.

(albeit without sovereign status) with whom Westminster has *shared* some of its legislative powers? Typically, the issue has been framed in terms of whether ASPs are a form of secondary legislation, and hence subject to the normal common law grounds of review, or primary legislation, and therefore reviewable only on the grounds set out in the Scotland Act.<sup>10</sup>

Lords Hope and Reed – the only justices to discuss this issue at length<sup>11</sup> – clearly regarded ASPs as a species of primary legislation. However, taking a largely non-formalistic approach, neither thought this was determinative of their susceptibility to review at common law. For both, the issue had to be addressed as a matter of principle concerning the appropriate relationship between courts and democratic legislatures. Indeed, both noted that it is only because of what one might term the “technicality” of Westminster’s sovereignty that the reviewability of primary legislation *in principle* has never previously been resolved.

Both judges were clear that review of ASPs on normal common law grounds – for irrationality, improper purposes, irrelevant considerations and so on – is *not* appropriate. For Lord Hope this was because of the Scottish Parliament’s democratic credentials which, despite its lack of sovereignty, entitle it to the same degree of judicial respect as the UK Parliament. Lord Reed was similarly concerned about the justiciability of ASPs, but he also considered that control on normal common law grounds was functionally inappropriate: in the absence of any positive constraints on the Scottish Parliament’s powers, the standard grounds simply have no purchase.

However, it does not follow that review at common law is never possible. Both agreed that ASPs of an extreme kind which violated the rule of law – which, say, abolished judicial review or seriously diminished access to the courts – would not be upheld by the courts. For Lord Hope, the justification for this lay in his view, previously stated in *Jackson v Attorney General*,<sup>12</sup> that “the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based”.<sup>13</sup> While he recognised an unresolved conflict between the rule of law and parliamentary sovereignty in relation to the UK Parliament, there was no such conflict as regards the Scottish Parliament. Moreover, the fact of executive dominance at Holyrood, as at Westminster, made it necessary that the courts should be able to exercise such control.

Lord Reed, by contrast, relied on the interpretative principle laid down in *R v Secretary of State for the Home Department ex p Simms*,<sup>14</sup> namely that the UK Parliament cannot legislate contrary to fundamental rights or the rule of law except by express words or necessary implication. It followed from this, he argued, that it

10 See A McHarg, “What is delegated legislation?” [2006] PL 539; T Mullen, “The *Axa Insurance* case: challenging Acts of the Scottish Parliament for irrationality” 2010 SLT (News) 39, and sources cited therein.

11 At paras 42-52 and 135-154 respectively.

12 [2005] UKHL 56, [2006] 1 AC 262 at para 107.

13 *Axa* at para 51.

14 [2000] 2 AC 115.

could not, by general or ambiguous words, confer power on another body to do so either. Accordingly, when it enacted the Scotland Act:<sup>15</sup>

Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.

Like Lord Hope, he did not think this was of purely academic significance, since the Convention rights protected by the Scotland Act are not, he claimed, an exhaustive statement of fundamental rights under our legal system.

### C. STANDING

The standing point which arose in *Axa* was an unusual one, namely whether eight individuals who had been diagnosed with pleural plaques, and were, therefore, potential beneficiaries of the 2009 Act, were entitled to enter into the process as co-defenders. Under Rule 58.8(2) of the Court of Session Rules any person who is “directly affected” by a judicial review petition may apply for leave to do so. The Outer House held that the rule should be construed generously and allowed the application. However, the Inner House reversed this decision holding that, since the Rule of Court was simply a procedural measure, the phrase “directly affected” was constrained by the substantive law on title and interest laid down by the House of Lords in *D&J Nicol v Dundee Harbour Trustees*.<sup>16</sup> Since there was no authority for the proposition that beneficiaries of legislation had title to defend it, the appropriate course of action would have been to enter the process as interveners.

In the Supreme Court, Lord Hope and Lord Reed (again the only judges to address the issue)<sup>17</sup> agreed with the Lord Ordinary that the individual beneficiaries should be regarded as “directly affected”. Although they acknowledged that Rule 58.8(2) could not itself change the substantive law, they thought that the time had come to abandon the test laid down in *D&J Nicol*. The highly restrictive approach to standing that this produced has long been subject to criticism,<sup>18</sup> and indeed the Gill Review recently recommended – and the Scottish Government accepted – that it should be abandoned.<sup>19</sup>

For both judges, the *D&J Nicol* test was inappropriate because it had been adopted before the modern development of public law and was therefore rooted in irrelevant private law concepts. Invoking the (problematic) distinction between public law and private law judicial review first identified in *Davidson v the Scottish Ministers*

<sup>15</sup> *Axa* at para 153.

<sup>16</sup> 1915 SC (HL) 7.

<sup>17</sup> *Axa* at paras 53-64 and 155-175 respectively.

<sup>18</sup> See generally T Mullen, “Standing to seek judicial review”, in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) 241.

<sup>19</sup> *Report of the Scottish Civil Courts Review* (2009) vol 2 at 29; Scottish Government, *Response to the Report and Recommendations of the Scottish Civil Courts Review* (2010) para 170.

(*No 1*),<sup>20</sup> they argued that in public law cases the role of the court was not to vindicate rights, but rather to ensure compliance with the rule of law. Accordingly, although the title and interest test remained appropriate for judicial review cases in the private sphere, in public law cases the test should be based on interests alone, and the term “standing” used in future. For Lord Hope, the words “direct interest” in Rule 58.8(2) captured what was required, whereas Lord Reed preferred the English terminology of “sufficient interest”. Nevertheless, both agreed that it is not always necessary to show a particular or personal interest: the precise nature of the interest required will depend on the context.

#### D. CONCLUSION

The decision in *Axa* has significance beyond Scotland, not least because the Northern Ireland Assembly has passed legislation almost identical to the 2009 Act.<sup>21</sup> More generally, the ruling on common law reviewability has implications for all the devolved legislatures, and adds weight to the line of authority, culminating in *Jackson*, suggesting that Acts of the UK Parliament are no longer immune from review. It is, however, worth bearing in mind that everything said on this point was *obiter*. Hence, although the other five justices agreed with Lords Hope and Reed, one should not read too much into this in attempting to predict how a direct challenge to parliamentary sovereignty would be received. Nevertheless, while the Court’s assertion that ASPs are subject to review on rule of law grounds is of questionable legitimacy (what precisely are the constitutional rights which are not protected by the Scotland Act? Does the existence of majority government at Holyrood really pose a threat to the rule of law, given the legal and political constraints under which it operates?), on balance the decision is probably good news for the Scottish Parliament. The equiparation of ASPs to UK Acts and the notion that the UK Parliament is constrained by constitutional norms in its own law-making, whether in its weaker (*Simms*) or stronger (*Jackson*) form, paves the way for fuller legal recognition and protection of the political and constitutional importance of the devolved institutions (should Scotland remain within the Union) than a traditional understanding of parliamentary sovereignty would permit.

In practical terms, the most significant aspect of the decision is likely to be the liberalisation of standing. However, much will depend on the attitude of Court of Session judges to the change, since *Axa* leaves a number of important issues unresolved. For one thing, it is unfortunate that there was no agreement on the exact wording of the new test. It is also unclear whether standing should continue to be treated as a threshold matter or whether, as in England, there is now to be a fusion of standing and merits. Furthermore, the distinction drawn between public law and

20 [2005] UKHL 76, 2006 SC (HL) 41.

21 Damages (Asbestos-Related Conditions) Act (Northern Ireland) 2011. Before it received Royal Assent, the Attorney General for Northern Ireland took the unprecedented step of referring the Bill to the Supreme Court for a ruling on its validity. However, apparently as a result of political pressure, the reference was withdrawn before the case was heard. Instead, both the Attorney General and the Northern Ireland Department of Finance and Personnel made written interventions in *Axa*.

private law judicial review is, in my view, misguided. It is not necessarily true – *contra* Lord Hope<sup>22</sup> – that only people in a contractual relationship with private decision-makers would be interested in seeking review. Accordingly, there may still be a case for legislative reform of standing to address these outstanding issues.

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*(I am grateful to participants at seminars at Edinburgh and Glasgow Universities in December 2011 for additional insights into this case.)*

EdinLR Vol 16 pp 229-232

## Public Standards in Scotland: A Rubik's Cube?

Since the MPs' expenses scandal broke in the summer of 2009, much attention has been focused on the regulation of politicians, their expenses and their interests. Scotland had its own scandal, which saw Wendy Alexander resign as Scottish Labour leader following an investigation into the funding of her leadership campaign. At a UK level, the Parliamentary Standards Act 2009 has been enacted.<sup>1</sup> In Scotland there was not a similar response to the Alexander investigation. A revised Code of Conduct for MSPs has been published but the only significant change is the enactment of the Scottish Parliamentary Commissions and Commissioners etc Act 2010,<sup>2</sup> which came into force on 1 April 2011.

### A. THE COMMISSION FOR ETHICAL STANDARDS IN PUBLIC LIFE

The 2010 Act abolished the office of the Scottish Parliamentary Standards Commissioner,<sup>3</sup> the person charged with investigating complaints against MSPs, and transferred his functions to the new Public Standards Commissioner for Scotland. The system ought, therefore, to continue to function in broadly the same way as before.

The Public Standards Commissioner, together with the Public Appointments Commissioner for Scotland,<sup>4</sup> form the newly established Commission for Ethical

<sup>22</sup> *Axa* at para 58.

<sup>1</sup> For a full discussion of the Act, see N Parpworth, "The Parliamentary Standards Act 2009: a constitutional dangerous dogs measure?" (2010) 73 MLR 262.

<sup>2</sup> Henceforth "the 2010 Act".

<sup>3</sup> An office created as recently as July 2002 by the Scottish Parliamentary Standards Commissioner Act 2002 (henceforth "the 2002 Act").

<sup>4</sup> Who has assumed the joint functions of the Commissioner for Public Appointments in Scotland (created by the Public Appointments and Public Bodies etc (Scotland) Act 2003) and the Chief Investigating

Standards in Public Life in Scotland.<sup>5</sup> Both commissioners are independent of the Scottish Parliament, the Scottish Executive and the Parliamentary Corporation<sup>6</sup> and their independence is secured in two ways. First, each commissioner is appointed for a single, non-renewable term of eight years.<sup>7</sup> Secondly, they can only be removed from office by the Scottish Parliament on a motion supported by two-thirds of all MSPs.<sup>8</sup>

## B. THE ROLE OF THE PUBLIC STANDARDS COMMISSIONER

The role of the previous Scottish Parliamentary Standards Commissioner was an important one but not one that was widely understood. He could have a significant impact upon the career of an MSP, Wendy Alexander perhaps being the most high-profile example.<sup>9</sup> What then does the legislation expect of the new Public Standards Commissioner for Scotland? His functions are essentially two-fold: to investigate any complaint against an MSP that alleges a breach of any of the “relevant provisions”; and to report to the Scottish Parliament on the outcome of any such investigation.<sup>10</sup> The “relevant provisions”, so far as they are currently applicable,<sup>11</sup> are the Standing Orders of the Scottish Parliament, the Code of Conduct for MSPs and the Interests of Members of the Scottish Parliament Act 2006.<sup>12</sup> The commissioner’s role is purely investigatory. He has no power to determine whether an MSP is in fact in breach of any of the relevant provisions and he is expressly precluded from offering a view on the appropriate sanction that should be imposed,<sup>13</sup> and even from offering advice to an MSP as to whether his or her proposed conduct would constitute such a breach.<sup>14</sup> Having concluded his investigation, he reports to the Standards, Procedures and Public Appointments Committee of the Scottish Parliament (“the SPPA”),<sup>15</sup> which is not bound by the commissioner’s findings of fact or his conclusions.<sup>16</sup> It is also open to the SPPA to consider matters afresh and, if necessary, to direct the commissioner to carry out further investigations.<sup>17</sup> Once the SPPA has reached a conclusion on

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Officer (created by the Ethical Standards in Public Life etc (Scotland) Act 2000), both offices having been abolished by the 2010 Act s 2(1)-(3).

<sup>5</sup> See <http://www.ethicalstandards.org.uk/>.

<sup>6</sup> 2010 Act s 4.

<sup>7</sup> 2010 Act s 9(1).

<sup>8</sup> 2010 Act s 9(4).

<sup>9</sup> For a fuller discussion of some of the issues arising from the Alexander investigation, see N S Ghaleigh, B Kemp and P Reid, “Politics as a profession: electoral law, parliamentary standards and regulating politicians”, 2012 PL, forthcoming.

<sup>10</sup> 2002 Act s 3(1).

<sup>11</sup> 2002 Act s 3(3).

<sup>12</sup> Henceforth “the 2006 Act”.

<sup>13</sup> 2002 Act s 9(2).

<sup>14</sup> 2002 Act s 3(6).

<sup>15</sup> Scottish Parliament Standing Orders Rule 3A.4.

<sup>16</sup> 2002 Act s 10(1); for example see 6th Report 2008 (Session 3) of the Standards, Procedure and Public Appointments Committee: Complaint against Wendy Alexander MSP, available at <http://archive.scottish.parliament.uk/s3/committees/stanproc/reports-08/stpr08-06.htm>.

<sup>17</sup> 2002 Act s 10(2).



the commissioner's report it in turn reports to the Scottish Parliament, where a final decision is made. The Parliament is similarly not bound by the conclusions reached by either the commissioner or the SPPA on whether an MSP has breached the relevant provisions or on the appropriate sanction to impose.

So, on the face of it, an MSP who is the subject of a complaint has little to fear from the commissioner: his or her fate will ultimately rest in the hands of fellow MSPs, should matters get that far. The combined effect of two other provisions, however, may have serious consequences for the career of an MSP before matters find their way to the SPPA, let alone the Parliament. The Scotland Act 1998<sup>18</sup> required provision to be made for a register of members' interests.<sup>19</sup> Section 39(6) of the Act makes it an offence to take part in any proceedings in the Parliament without having complied with rules relating to members' interests, an offence punishable on summary conviction by a level 5 fine on the Standard Scale.<sup>20</sup> In addition, section 17 of the 2006 Act prescribes that a breach of a number of provisions of that Act, in particular those concerning non-registration of interests, shall be an offence for the purpose of section 39 of the Scotland Act.<sup>21</sup> In short, therefore, where an MSP is found to have failed to register a gift or other interest he or she will also have committed a criminal offence. Under the 2002 Act, however, the final say on whether there has been such a breach rests in the hands of the Parliament.

### C. THE PROBLEM

Consequently the spectre of criminal proceedings should only arise once the Scottish Parliament has determined whether or not a breach has taken place. However, matters can end up in the hands of the criminal authorities before then. The commissioner is required to follow any directions given to him by the Parliament<sup>22</sup> and the Parliament has directed that where he, the commissioner, is satisfied that if any complaint against an MSP was upheld it would constitute a criminal offence, he must suspend his investigation and report the matter to the Procurator Fiscal.<sup>23</sup> That direction, read together with section 17 of the 2006 Act and section 39(6) of the Scotland Act, has the effect that if the commissioner takes the view that an MSP may have breached the rules on registration of an interest, he must refer the matter to the Procurator Fiscal *before* reporting to the SPPA. The 2010 Act does nothing to address the inconsistency between entrusting the final decision to the Scottish Parliament

<sup>18</sup> s 39.

<sup>19</sup> Prior to the 2006 Act this was initially done by means of a transitional order, Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999, SI 1999/1350.

<sup>20</sup> Scotland Act 1998 s 39(7); as to the Standard Scale, see s 225 of the Criminal Procedure (Scotland) Act 1995. A level 5 fine is currently fixed at £5,000.

<sup>21</sup> The requirements are set out in the Interests of Members of the Scottish Parliament Act 2006 ss 3, 5 and 6.

<sup>22</sup> 2002 Act s 4(2).

<sup>23</sup> Scottish Parliamentary Standards Commissioner Act 2002 (Procedures, Reporting and Other Matters) Direction 2002 para 14. The full direction is contained in Volume 4 Annex 5 of the Code of Conduct for MSPs, available at <http://www.scottish.parliament.uk/msps/12446.aspx>.

under the 2002 Act and requiring the commissioner to trigger a criminal investigation before he has even reported to the SPPA. When the Parliamentary Standards Act 2009 was being debated in the House of Lords, a proposal that failing to register a financial interest should be an offence was dropped by the government in the face of opposition.<sup>24</sup> It is thus a criminal offence for an MSP to fail to register an interest but not for an MP, a distinction that is hard to justify on any principled basis. The Scotland Bill currently before the UK Parliament goes some way to addressing this anomaly. Clause 8 of the Bill would amend section 39 of the Scotland Act so as to remove the mandatory nature of the criminal sanction attaching to a breach of the members' interest rules and give the Scottish Parliament discretion as to whether or not any breach should constitute an offence. If that provision becomes law, further legislation will be necessary to amend the 2006 Act if the criminal sanction is to be removed.

#### D. CONCLUSION

Having taken the time to pass legislation transferring the functions of the Parliamentary Standards Commissioner to a new commissioner, in a new commission, it is unfortunate that the opportunity was not taken to look afresh at how his functions operate within the overall structure of political regulation in Scotland. The 2010 Act further adds to the plethora of existing legislation in this field. Those wishing to ascertain how the system now operates must look at the Scotland Act, the 2002 Act, the 2006 Act, the 2010 Act, the Code of Conduct for MSPs and the Scottish Parliamentary Standards Commissioner Act 2002 (Procedures, Reporting and Other Matters) Direction 2002 before trying to piece together the jigsaw. The Scotland Bill promises to add a new dimension. And this is without considering the obligations imposed on MSPs under the Political Parties, Elections and Referendums Act 2000, which is enforced by the UK Electoral Commission.<sup>25</sup> One wonders whether a Rubik's cube is not a better analogy.

The 2010 Act is, arguably, a missed opportunity to have a more systematic review of the whole system for regulating the conduct of MSPs and to produce a tidier and more readily understandable scheme. Instead, it altered the structures that are in place but not the substantive rules. Day-to-day life, therefore, remains very much as it was before, albeit the 2010 Act adds another dimension to the puzzle for those trying to advise or enforce, let alone comply with, the rules.

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*Advocate*

*(Thanks are due to Navraj Singh Ghaleigh and Ben Kemp, with whom many hours have been spent discussing the regulation of politics and politicians.)*

<sup>24</sup> See Parpworth (n 1) 276.

<sup>25</sup> See N S Ghaleigh, "The regulator: the first decade of the electoral commission", in KD Ewing, J Rowbottom and J-C Tham (eds), *The Funding of Political Parties: Where Now?* (2011) 153.

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## Sentence Discounting for Guilty Pleas: A Question of Guidelines

Sentence discounting is the practice whereby an offender receives a lesser sentence than he would otherwise have done because he pled guilty. In *Gemmell v HM Advocate*<sup>1</sup> sentence discounting was considered for the first time by a Full Bench and while some important questions surrounding the practice were resolved, a rift was exposed between members of the court as to the desirability of having firm guidelines.

### A. BACKGROUND

The relevant statutory provision is section 196 of the Criminal Procedure (Scotland) Act 1995,<sup>2</sup> which provides that where an offender has pled guilty, the sentence shall take into account (a) the stage in the proceedings at which he indicated his intention to do so and (b) the circumstances in which the indication was given. The court must state whether a 'discount' has been imposed and must give reasons if it has not.<sup>3</sup> In *Du Plooy v HM Advocate*<sup>4</sup> the court held that any discount "should normally not exceed a third of the sentence which would otherwise have been imposed".<sup>5</sup> In *Spence v HM Advocate*,<sup>6</sup> the court set out the appropriate levels of discount as one third, one quarter and a maximum of one tenth for guilty pleas at section 76,<sup>7</sup> preliminary hearing and trial stages respectively.<sup>8</sup>

### B. GEMMELL V HM ADVOCATE

*Gemmell* involved seven conjoined appeals against sentence which raised two common issues: (1) whether a discount should apply to any public protection element of a sentence and (2) whether periods of disqualification from driving or penalty points should be discounted.<sup>9</sup> The court also took the opportunity to make some general remarks about sentence discounting and to address the issue of whether discounts should be withheld where there is overwhelming evidence against the offender.

1 [2011] HCJAC 129.

2 Henceforth "the 1995 Act".

3 s 196(1A). On the history of the legislation, see *Gemmell* (n 1) at paras 5-26 per the Lord Justice-Clerk; F Leverick, "Tensions and balances, costs and rewards: the sentence discount in Scotland" (2004) 8 EdinLR 360 at 362-369.

4 2005 JC 1.

5 Para 26.

6 2008 JC 174.

7 Under s 76 of the 1995 Act the accused can request an early hearing specifically to plead guilty.

8 Para 14.

9 Para 1.

### (1) The basis of sentence discounting

The first issue the court addressed was the proper rationale for awarding a sentence discount. The practice is usually justified in one or more of three ways: guilty pleas save time and money (the ‘efficiency’ rationale); they spare victims from the stress of giving evidence; and they are an indication of remorse.<sup>10</sup> The court was unanimous in identifying the ‘efficiency’ rationale as the most convincing<sup>11</sup> and rejected the remorse rationale.<sup>12</sup>

The difficulty is that efficiency is a flimsy basis upon which to justify sentence discounting when weighed against the risks it entails. There are at least three concerns: sizeable discounts may induce the innocent to plead guilty; those who take their case to trial because they are entitled to be presumed innocent are unfairly penalised for doing so; and the criminal justice system may lose public credibility if sentences are passed which do not adequately reflect the seriousness of the offence.<sup>13</sup>

Thus there exists a fundamental – and possibly irresolvable – tension. Guilty pleas undoubtedly secure considerable cost savings.<sup>14</sup> But there are clear advantages to the accused in making the prosecution prove its case at trial – most notably that the case may fail due to a witness becoming unavailable. In order to induce significant numbers of accused persons to plead guilty and forego these advantages, the discount needs to be sizeable. However, the larger the discount, the more likely it is that the concerns noted above will be realised. The values involved (efficiency versus integrity) are incompatible and a choice has to be made.

This tension is illustrated by the differing opinions expressed in *Gemmell* on the desirability of having firm guidelines. The Lord Justice-Clerk took the view that “the court’s discretion to allow a discount should be exercised sparingly and only for convincing reasons”,<sup>15</sup> and where these have been given “it is only in exceptional circumstances that [the appeal court] should interfere”.<sup>16</sup> While not explicitly disapproving the sliding scale in *Spence*, he was reluctant to specify the appropriate level of discount except to note: “the broad principle that, in general, the discount will be the greater the earlier the plea is probably a sufficient statement of guidance for most purposes”.<sup>17</sup>

Lord Eassie, however, adopted a different tone:<sup>18</sup>

... it respectfully seems to me that if the utilitarian and cost-saving benefits underlying the principle of discounting sanctioned by the legislature are usefully to be realised, practitioners should, in general, be able to advise the client of the amount of the likely

10 See Leverick (n 3) 369-380.

11 Para 34 per the Lord Justice-Clerk.

12 Para 51 per the Lord Justice-Clerk.

13 Leverick (n 3) 380-384. The Lord Justice-Clerk (at paras 73-74) notes these concerns but rather confusingly conflates points (1) and (2), which are conceptually distinct issues.

14 See the official figures cited in *Gemmell* at paras 34-35.

15 Para 77.

16 Para 81.

17 Para 78.

18 Para 145.

discount with some degree of confidence. That necessarily involves the elaboration of principles, or guidance, for the exercise of the discretion upon which practitioners can have some reliance and hence the creation of a legitimate expectation, peculiar circumstances apart, that the guidance will be followed.

None of the other members of the court addressed the issue and thus sentencers are left to choose between two competing approaches: Lord Eassie's, whereby the sliding scale in *Spence* is applied in all but exceptional circumstances; and the Lord Justice-Clerk's discretionary approach, subject only to the general principle that larger discounts should be awarded for earlier pleas.

The Lord Justice-Clerk is clearly uncomfortable with sentence discounting – for good reason. However, his approach risks inconsistency, as he says nothing about the circumstances in which a discount can legitimately be withheld.<sup>19</sup> Reducing guidance on the appropriate level of discount to such general terms takes the law back to where it stood before *Spence* when there were considerable inequalities in the application of discounts,<sup>20</sup> which is why the appeal court in *Spence* issued sentencing guidelines in the first place.<sup>21</sup> The Lord Justice-Clerk cannot have it both ways. If he accepts the policy aim of encouraging guilty pleas for the efficiency benefits this brings (which he appears to do),<sup>22</sup> the best way of achieving this is to offer sizeable and – most importantly – *reliable* discounts, even if the sentences ultimately passed compromise other aims such as public protection or proportionality. Lord Eassie explicitly concedes this point – as do the applicable sentencing guidelines in England and Wales<sup>23</sup> – and, therefore, in terms of logic his approach is to be preferred.

## (2) Public protection

In *Du Plooy*, the court remarked that where a sentence “contains an element which is designed to protect the public from the accused's reoffending, [it] should not, to that extent, be subject to any allowance in respect of the plea of guilty”.<sup>24</sup> Subsequent authorities<sup>25</sup> have interpreted this to mean that a discount should not be applied to any public protection element in a sentence,<sup>26</sup> or that where public protection is paramount the discount can be withheld or reduced. The court in *Gemmell* was divided but the majority held that these cases had been wrongly decided,<sup>27</sup> thus clarifying that the discount should be applied to the sentence as a whole and should

19 One possible interpretation of his comments is that it should be withheld where the evidence against the offender is overwhelming, but he rules this out (see text accompanying nn 38-40 below).

20 N Orr, “*Du Plooy* deployed” 2007 SLT (News) 143.

21 *Spence* (n 6) at para 14.

22 *Gemmell* (n 1) at paras 34-35.

23 Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) para 2.1.

24 *Du Plooy* (n 4) at para 19.

25 See the cases cited by the Lord Justice-Clerk at paras 16-21 of *Gemmell*.

26 Sentencers are not generally required to attribute particular proportions of sentences to specific purposes, such as public protection, but this approach has been taken in some sentence discounting cases (e.g. *Jackson v HM Advocate* 2008 JC 443).

27 Para 54 per the Lord Justice Clerk, para 141 per Lord Eassie and para 166 per Lord Wheatley.

not be reduced where there is a particularly pressing need for public protection.<sup>28</sup> The main reason given by the majority is that public protection is already taken into account when determining the headline sentence and to reduce the size of the discount on this basis would be “double counting, unfairly to the disadvantage of the accused”.<sup>29</sup>

The contrary argument is that protection of the public is so important that it should never be compromised.<sup>30</sup> The tension between the two positions is recognised explicitly by Lord Eassie:<sup>31</sup>

... the policy decided upon by the legislature of requiring the courts to consider discounting sentences on account of early pleas of guilt on utilitarian grounds implies a recognition that the reduction in the public protection factor entailed in such a discount is to be accepted as a counterpart to the utilitarian benefit to the public interest of securing early pleas of guilt.

### (3) Disqualification and penalty points

In *Stewart v Griffiths*,<sup>32</sup> it was held that penalty points were not covered by sentence discounting on the basis that they are a warning to the accused about his future driving and not a penalty. The court held unanimously that *Stewart* was wrongly decided,<sup>33</sup> given the Full Bench decision in *Tudhope v Eadie*<sup>34</sup> which held in a different context that penalty points are a penalty.<sup>35</sup> Thus penalty points can be discounted, as can periods of disqualification from driving.<sup>36</sup> This sets Scotland apart from England and Wales, where penalty points and disqualification are regarded as “ancillary orders” and are exempt from the sentence discounting regime.<sup>37</sup>

### (4) A ‘caught red-handed’ exception?

The final substantive point addressed in *Gemmell* is whether the accused who pleads guilty in the face of overwhelming prosecution evidence should receive the full or

28 This does not, however, apply to the extension period of an ‘extended sentence’ (para 67 per the Lord Justice-Clerk). An extended sentence is a sentence of imprisonment that contains a custodial term and an extension period imposed solely for the protection of the public, during which the offender remains under supervision (1995 Act, s 210A(2)).

29 Para 57 per the Lord Justice-Clerk.

30 Para 119 per Lord Osborne and para 151 per Lady Paton.

31 Para 140.

32 2005 SCCR 291.

33 Para 72 per the Lord Justice-Clerk; para 132 per Lord Osborne (in which he accepted that his own remarks in *Stewart* “cannot be supported”), para 143 per Lord Eassie, para 156 per Lady Paton and para 167 per Lord Wheatley.

34 1984 JC 98.

35 A view shared by the European Court of Human Rights in *Malige v France* (1999) 28 EHRR 578 at paras 35-40.

36 Para 70 per the Lord Justice-Clerk, para 131 per Lord Osborne, para 143 per Lord Eassie, para 156 per Lady Paton and para 167 per Lord Wheatley. This is subject to the proviso that a discount cannot take any penalty imposed below the statutory minimum.

37 *Definitive Guideline* (n 23) para 2.6.

indeed any sentence discount. The issue is difficult because the courts may not wish to be seen as “rewarding” something morally undeserved purely because it brings efficiency benefits. In *Du Plooy*, the court accepted that the caught red-handed exception “cannot be pressed too far”,<sup>38</sup> but the High Court has subsequently reduced the discount in cases where the Crown case was exceptionally strong.<sup>39</sup> In *Gemmell* the court conclusively rejected the idea of a caught red-handed exception: “In terms of utilitarian benefit to the public interest in saving costs and accelerating disposal of cases... the strength of the prosecution case is, in principle, of little relevance.”<sup>40</sup>

This is quite correct. If sentence discounting is to be justified on an efficiency basis rather than a moral one, logic dictates that the full discount be given to all those who plead guilty regardless of the strength of the case against them.

### C. CONCLUSIONS

On the specific issues that were the subject of the appeal, *Gemmell* provides useful clarification of the law. It is now clear that any discount should be applied to the sentence as a whole, including any part designated for public protection, and that the size of the discount should not be reduced even where there is a particularly pressing need to protect the public. Periods of disqualification from driving and penalty points can be discounted and discounts should not be withheld even where the evidence against the accused is overwhelming. Starting from the premise that sentence discounting is justified on the grounds of efficiency, the court’s conclusions are sound even if this may compromise other policy objectives.

Confusion remains, however, over the desirability of firm guidelines. Lord Eassie’s view is straightforward: if the policy aim of encouraging guilty pleas is to be realised, there must exist a legitimate expectation that a discount of a certain magnitude will in fact be received. Thus in all but the most exceptional circumstances sentencers should apply the graduated approach set out in *Spence*. The Lord Justice-Clerk’s view is that sentence discounting should not be reduced to a “purely mechanical exercise” and that a greater element of discretion should be permitted, as long as the sentencer can provide “cogent reasons” for his decision.<sup>41</sup> But he gives no indication of what those cogent reasons might be, leaving open the danger of inconsistency.

The Lord Justice-Clerk’s dilemma illustrates the inherent (and probably irreconcilable) tension involved in offering discounts for guilty pleas: the need to retain public confidence in the criminal justice process by passing sentences that reflect the gravity of the offence and the desirability of securing cost savings by offering sufficiently large and reliable discounts to provide a real incentive for guilty

<sup>38</sup> *De Plooy* (n 4) at para 21.

<sup>39</sup> See the cases cited at paras 22-23 of *Gemmell*.

<sup>40</sup> Para 148 per Lord Eassie.

<sup>41</sup> Para 81.

pleas at an early stage. His failure to come down on one side or the other of this divide has left the law in a state of some confusion.

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## Immunity Wearing Off: *Jones v Kaney* in the Supreme Court

In *Jones v Kaney*,<sup>1</sup> the claimant sought to hold liable in negligence a defendant who had previously acted as his expert in a claim for personal injury, alleging that the defendant had shown an “egregious”<sup>2</sup> lack of care. At first instance, the claim was struck out on the basis that the expert was protected by the witness’s immunity from suit.<sup>3</sup> However, the district judge acknowledged that the case raised an issue of general public importance and granted a “leapfrog certificate”, permitting a direct appeal to the Supreme Court.

### A. THE SCOPE OF THE SUPREME COURT DECISION

The case was heard by a court of seven justices. The claimant’s senior counsel presented his case conservatively, seeking only to persuade the court that an expert witness does not enjoy immunity from suit in respect of the act of preparing a joint witness statement.<sup>4</sup> However, the Supreme Court felt compelled to decide the case on a broader basis.<sup>5</sup> By a majority of five to two,<sup>6</sup> the Court abolished the immunity from suit for breach of duty by an expert witness hired by one of the parties to a litigation.<sup>7</sup> The majority decision is directed towards correcting one particular problem: the injustice caused to a litigant who suffers loss as a result of the negligent failings of the very person hired to assist him. In reaching its decision, the majority made two distinctions. First, it differentiated between the so-called friendly expert, hired to give evidence on a party’s behalf, and mere witnesses to fact and experts not so employed. The appeal decision relates only to friendly experts,<sup>8</sup> and, therefore,

1 [2011] UKSC 13, [2011] 2 WLR 823.

2 Para 68 per Lord Brown. For the facts of the case, see Lord Phillips at paras 3-10.

3 *Jones v Kaney* [2010] EWHC 61 (QB).

4 Para 2 per Lord Phillips. This challenged the Court of Appeal’s decision in *Stanton v Callaghan* [1998] QB 75.

5 Para 2 per Lord Phillips; para 71 per Lord Collins.

6 The majority comprised Lords Phillips, Brown, Collins, Kerr and Dyson. Lord Hope and Baroness Hale dissented.

7 Para 62 per Lord Phillips.

8 Para 71 per Lord Collins.



does not apply where an expert provides evidence as to fact, or prepares a report for potential use in a criminal prosecution that subsequently turns out to be unreliable, leading to the discontinuation of the prosecution.<sup>9</sup> Secondly, a distinction was also made between witness immunity in a general sense and the defence of absolute privilege. Only the former is affected by *Jones v Kaney* and friendly experts, like all witnesses (as well as judges and advocates), will continue to enjoy the defence of absolute privilege if sued in defamation for things said in evidence.<sup>10</sup> The *ratio* of the case is, therefore, tightly circumscribed.

In one area, however, the scope of the decision is not entirely clear. It is likely that it will be held to apply to friendly experts in all forms of legal proceedings. Lady Hale, in her dissent, was particularly critical of the difficulties of applying the decision outside the ordinary civil context.<sup>11</sup> Lord Dyson noted that “although it is unnecessary to decide the point, as presently advised I can see no reason to treat expert witnesses who are engaged in criminal and family litigation any differently from those engaged in civil litigation.”<sup>12</sup> Thus the majority’s views on criminal and family litigation are strictly *obiter dicta*. One can hardly say that the door to separate treatment for criminal and family cases has been left open; however, it has perhaps been left on the latch rather than securely locked and bolted.

## B. THE MAJORITY’S REASONS

The prime reason for striking down the expert witness’s immunity from suit was “[the] general rule that every wrong should have a remedy and that any exception to this rule must be justified as being necessary in the public interest,”<sup>13</sup> a principle described by Lord Dyson as “a cornerstone of any system of justice”.<sup>14</sup> The majority was unimpressed by the public policy arguments advanced in support of the immunity<sup>15</sup> and held, therefore, that no deviation from the general rule was justified.

Another factor which weighed heavily was the modern evolution of the law of negligence. For the minority, the long pedigree of expert witness immunity<sup>16</sup> meant that it should not be removed lightly. The majority, by contrast, considered that its very antiquity demonstrated a need to reconsider the immunity. It was noted that the witness immunity rule pre-dated the imposition of liability for

9 Such as occurred in *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184.

10 Para 62 per Lord Phillips.

11 Paras 183-187.

12 Para 12.

13 Para 108 per Lord Dyson.

14 Para 113.

15 The two most notable arguments were the risks that (1) properly qualified experts may be unwilling to appear in court proceedings if they fear being sued; and (2) an expert who feared being sued might feel pressured into doggedly defending evidence which supported the client’s position and thus fail to fulfil the expert’s duty to the court.

16 Or, at least, of *witness* immunity: there was some debate on the relevance of the early cases which did not involve friendly expert witnesses.

negligent misstatement.<sup>17</sup> And, given the abolition (in England and Wales, at least)<sup>18</sup> of advocates' immunity from suit,<sup>19</sup> the majority perceived significant similarities between the position of the expert and the advocate,<sup>20</sup> and considered that the two should be equated.<sup>21</sup>

In applying the touchstones for the imposition of a duty found in the modern law of negligence, the majority was influenced by the fact that an expert witness "will voluntarily have undertaken duties to his client for reward under contract"<sup>22</sup> whereas an ordinary witness to fact or non-friendly expert will not, a difference Lord Brown described as "profound".<sup>23</sup> Lord Hope, on the other hand, considered the fact of remuneration to be an insufficient reason for differentiating between an ordinary witness to fact and an expert.<sup>24</sup> It is submitted, however, that the fact that the defender has received payment for his services does bear upon proximity, and has previously been used to support the imposition of a duty of care in other contexts.<sup>25</sup>

### C. THE DISSENTING JUDGMENTS

Lord Hope and Lady Hale were deeply concerned to see the retrospective removal of this long-standing immunity, and felt that if change were required, it should be made by the appropriate Parliament after consideration by the relevant Law Commission. They considered the majority's approach to raise important issues concerning the Supreme Court's approach to binding precedent<sup>26</sup> and the stability of the law. In particular, it was not clear to Lord Hope why, in principle, friendly experts should be treated differently from other experts, or from witnesses in general, or why an immunity should be abolished for one cause of action (negligence) but retained for another (defamation).<sup>27</sup> He took the view that, despite the apparent narrowness of its *ratio*, the majority decision would have a destabilising influence on the law. Both considered that while retention of the immunity would lead to some deserving claimants going uncompensated, it was wrong to focus too intensely on such cases. The immunity existed for a higher reason than to permit negligent experts to escape liability, namely to prevent honest witnesses from being harassed by disappointed

17 Para 11 per Lord Phillips.

18 Scots law retains advocates' immunity, at least for criminal litigation, see *Wright v Paton Farrell* 2006 SLT 269.

19 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

20 See Lord Phillips at paras 46-50. Lord Brown viewed expert witnesses as a category *sui generis*, having little in common with either ordinary witnesses of fact or advocates (at para 64).

21 It was also noted that the abolition of advocates' immunity had not led to the adverse consequences some had predicted (para 57 per Lord Phillips).

22 Para 18 per Lord Phillips; para 88 per Lord Kerr.

23 Para 64.

24 Para 130.

25 See e.g. *Smith v Eric S Bush* [1990] 1 AC 831 at 847 per Lord Templeman. The courts have also declined to impose a duty where the defender has not been paid, see e.g. *Bank of Scotland v Fuller Peiser* 2002 SLT 574 at 579 per Lord Eassie.

26 Para 175 per Lady Hale.

27 Para 160.

litigants, and indirectly, therefore, to protect the interests of justice. Lord Hope's judgment also contained a detailed analysis of the Scottish House of Lords case *Watson v M'Ewan*,<sup>28</sup> a case which the majority dismissed as being a decision turning on unusual facts, but which Lord Hope considered to be binding in Scots law.<sup>29</sup>

#### D. DISCUSSION

It is not possible in a short analysis to do justice to the full reasoning of the court. However, it is submitted that the outcome is correct and the majority's reading of the policy considerations is to be supported.

That said, the dissenting judgments also merit serious consideration. For instance, as noted above, Lord Hope would appear to be mistaken in believing that the fact that payment has been made does not bear upon proximity. However – and while his Lordship and the present author would disagree on the desirability of this – Lord Hope is correct to note that the majority's reasoning could be applied beyond the factual situation in *Jones v Kaney*. This decision does not itself provide authority for the proposition that an expert other than a friendly expert may incur civil liability, but the breadth of its underlying reasoning does not exclude the possibility either. The majority's reliance upon the general rule that every wrong should have a remedy and that any exception to this rule must be justified as necessary could just as readily be used to question the continued existence of other immunities in the law of negligence, such as that enjoyed by the police whilst engaged in the detection and suppression of crime.<sup>30</sup>

However, it is submitted that Lord Hope is incorrect to call into question the distinction drawn by the majority between defamation and negligence. In defamation, the law's presumption of falsehood and malicious communication with intent to cause a loss means that to aver a relevant case a pursuer only has to prove that a statement was defamatory. In the absence of a privilege, this would leave a witness acutely vulnerable. In negligence, by contrast, a pursuer must not only prove he was owed a duty of care, but that the duty was breached (which, in the context of an expert witness claim, will almost invariably involve satisfying the additional criteria pertaining to professional negligence) and that the breach caused loss. The pursuer, therefore, has much more work to do to establish a relevant case and, consequently, any witness called as a defender has much less to fear.

Finally, the majority's analysis of *Watson v M'Ewan* is unsatisfactory. While the facts of that case were somewhat unusual, the rule which emerges from the case does not depend upon them and Lord Hope's meticulous analysis is sound. Thus, while there is no principled reason for a distinction to emerge between Scots and English law on this point, the leading Scots authority appears to be at odds with *Jones v Kaney*. Lord Hope believes that the Scottish courts should continue to

<sup>28</sup> (1904) 7 F (HL) 109.

<sup>29</sup> Para 173.

<sup>30</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53. See G Gordon, "Liability of public authorities", in J Thomson (ed), *Delict* (2008) paras 20.40-20.50.

apply *Watson v M'Ewan*; however, in light of subsequent developments in the law of negligence, the current author finds that proposition unattractive. Perhaps Lord Hope's own dictum in *Mitchell v Glasgow City Council*,<sup>31</sup> that Scots and English law are now indistinguishable within the core areas of negligence, could provide authority that *Watson v M'Ewan* should now be departed from. On the other hand, it is highly unlikely that an immunity provided to a special category of witnesses could be characterised as a core area of negligence. When the parallel issue of advocates' immunity was considered by the Inner House<sup>32</sup> the Lord President held that the court was required "to make a judgment based less on legal precedent or on previously acknowledged principle, and more on what is appropriate as a matter of current legal policy".<sup>33</sup> It is submitted that a similar approach should be taken to expert witnesses, allowing the Scottish courts to consider afresh the competing arguments of policy and principle.

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## Where Sympathy Lies in Contractual Interpretation: "But What's Puzzling You, is the Nature of My Game"\*

It was recently reported in this journal<sup>1</sup> that Lloyds Banking Group plc ("the Bank") was successful in persuading the Outer House of a particular interpretation of its agreement with Lloyds TSB Foundation for Scotland (the "Foundation"). Lord Glennie found that where circumstances have changed beyond that which could have been anticipated by the parties when forming the agreement, "slight violence to the wording of the contract or Deed . . . may be necessary".<sup>2</sup> However the Bank found less sympathy in the Inner House<sup>3</sup> and the Foundation's appeal against the Outer House decision was successful.

31 2009 SC (HL) 21 para 25 per Lord Hope.

32 *Wright v Paton Farrell* 2006 SLT 269.

33 *Wright* (n 32) para 5.

\* The Rolling Stones, *Sympathy for the Devil*.

1 L Macgregor, "Long-term contracts, the rules of interpretation and 'equitable adjustment'" (2012) 16 EdinLR 104.

2 *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSOH 105, 2012 SLT 13 at para 81.

3 *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2011] CSIH 87.

Unlike the lower court, the Inner House gave little consideration to the methodology of interpretation or the interesting issue of equitable adjustment.<sup>4</sup> Nonetheless, it is a revealing decision for where the Inner House's sympathies may lie. The decision confirms that the Inner House, for now at least, will maintain a more orthodox approach to contractual interpretation – namely, to start with the language of the provision and move beyond it only if there is a latent ambiguity<sup>5</sup> – and does not wholly embrace the approach now synonymous with Lord Hoffmann.<sup>6</sup> By contrast, the justices of the Supreme Court appear more willing to start with the context rather than the language of the contract<sup>7</sup> and may be more sympathetic to the Bank's case should it progress further.

### A. THE FACTS

In summary, prior to its flotation in 1986 the TSB Group plc entered into various deeds of covenant (including one with the Foundation) in order to maintain its charitable roots.<sup>8</sup> The Bank became party to this agreement following the merger of TSB Group plc and Lloyds Bank, and undertook to make payments to the Foundation on the basis of a formula set out in the agreement. In essence, the Foundation was entitled to a proportion of the Bank's pre-tax profits.

Problems arose following the Bank's acquisition of HBOS in 2009 at a knock-down price. Changes in accountancy practice in 2005 meant that this needed to be recorded in the Bank's pre-tax profits (known as "negative goodwill"). Since negative goodwill amounted to well in excess of £11,173 million, the amount due to the Foundation rose dramatically to around £3 million. However, if negative goodwill was not included the payment due under the covenant would be around £38,000.

### B. THE INNER HOUSE DECISION

The crux of the Inner House decision appears to be that the Lord President did not believe these circumstances allowed for a re-assessment of how the covenant should be interpreted. In his view, a reasonable man with all the relevant background knowledge would have recognised the possibility that accountancy practice might change. He was also concerned that the Outer House decision appeared to be based on the notion that the contract required re-interpretation because of the "dramatic" figure now due to the Foundation. He was unimpressed by any hint of such a

4 See Macgregor (n 1) at 107 for detailed consideration of equitable adjustment in the Outer House decision.

5 See also Scottish Law Commission, Discussion Paper on *Interpretation of Contract* (Scot Law Com DP No 147, 2011) at para 5.1.

6 See also *Bank of Scotland v Dunedin Property Management Co Limited* 1998 SC 657 at 661 per Lord Rodger of Earlsferry; *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2009] CSIH 96, 2010 SC 302 at para 23 per Sir David Edward QC.

7 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *The Starsin* [2003] UKHL 12, [2004] 1 AC 715; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.

8 For further detail see Macgregor (n 1) at 105.

notion, insisting that the calculation had not changed, only the amount due, and “the particular outcome in one year cannot affect the meaning of the parties’ agreement”.<sup>9</sup> Circumstances had changed, not the contract.

There is certainly a difference in approach between the Inner House decision and that of the Outer House, but that difference is not based on interpretation of the natural words of the contract. Rather, it concerns three aspects of the interpretative process: (i) the knowledge imputed to the mind of the reasonable man when considering the operation of the formula; (ii) how much background information is needed before the court should consider an alternative interpretation of provisions which have an otherwise plain meaning; and crucially (iii) do you start with the background information in questions of interpretation or do you start with the contract?

Lord Glennie attributed to the mind of the reasonable man the “purposes and values” behind the covenant,<sup>10</sup> and in his view this background context allowed an interpretation which did “slight violence” to the natural meaning.<sup>11</sup> By contrast, the Lord President imputed to the reasonable man the knowledge “that it was possible that the accounting rules which had to be applied . . . might change”,<sup>12</sup> and there was, therefore, no reason to re-assess the natural meaning of the words. The covenant had been drafted with a clear and natural interpretation and if the parties wanted to avoid any problem arising from changes in accountancy practice, they should have drafted accordingly.

This could be considered a harsh decision for the Bank. A sympathetic interpretation might consider that the Bank did not intend an unrealised gain to be reflected in the calculation. The Lord President’s opinion is redolent of an argument suggested in a recent volume of this journal: why should a court help those who are “feckless” in drafting?<sup>13</sup>

### C. THE SUPREME COURT APPROACH

The approach of the House of Lords in the past, and of the Supreme Court more recently, is a more flexible one, which starts with the background and moves towards what is a plain and natural meaning in that context. Writing extra-judicially, Lord Steyn neatly summarised it:<sup>14</sup>

In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally commercially minded judges would regard the commercial purpose of the contract as more

<sup>9</sup> *Lloyds TSB* at para 18 per Lord President Hamilton.

<sup>10</sup> *Lloyds TSB* (OH) at para 66 per Lord Glennie.

<sup>11</sup> *Lloyds TSB* (OH) at para 81 per Lord Glennie.

<sup>12</sup> *Lloyds TSB* at para 12 per Lord President Hamilton.

<sup>13</sup> M Hogg, “Fundamental issues for reform of the law of contractual interpretation” (2011) 15 *EdinLR* 406 at 419.

<sup>14</sup> Lord Steyn, “Contract law: fulfilling the reasonable expectations of honest men” (1997) 113 *LQR* 433 at 441.

important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties.

This statement has recently been affirmed judicially<sup>15</sup> and a similar approach has occasionally been followed in the Outer House.<sup>16</sup> The Supreme Court seems more willing to forgive drafting errors or omissions, either in words or syntax, in order to gain a more commercially sensible interpretation even if this means some disloyalty to the language.<sup>17</sup> The House of Lords had previously stressed on numerous occasions the importance of context to give meaning to words and documents on the whole.<sup>18</sup> And if more emphasis is placed upon context the balance will swing in favour of a re-assessment of meaning in light of that context.

#### D. ANALYSIS AND CONCLUSION

Lord Glennie's Outer House decision has been criticised as introducing a third method of interpretation which only serves to add confusion to an already vexed area of contract law.<sup>19</sup> Of course, confusion is unwelcome. And contractual interpretation is indeed becoming a more puzzling area of the law. And yet his attempt to outline a "cross-check" method may not be such a novel method. It may be an attempt to find a consensus between those who believe the process should start with the text and those who believe it should start with the context. In fairness, it appears that he was trying to find a path through this uncertainty by outlining what in fact one does when faced with uncertainty. Words do not have a clear meaning unless placed in context. One naturally "cross-checks" from the words uttered to context and from context to the words uttered.

The Lord President seems to have started from the position that words do have a clear meaning without the need to revert to context. He acknowledged that one must review in light of the context but there was nothing in this particular context that could persuade him of any other interpretation. Emphasis was placed on the text rather than the context. However, faced with similar situations, the Supreme Court will happily – and liberally – draw from the background context even if that does slight violence to the natural meaning.<sup>20</sup> Importantly, previous Supreme Court decisions, and those of the House of Lords, appear to accept that there may in fact be two interpretations of what might otherwise appear to have a natural meaning. With this

15 *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at para 25 per Lord Phillips.

16 See Lord Reed's comments in *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] CSOH 208 at paras 15-26.

17 *Aberdeen City Council v Stewart Milne Group Limited* [2011] UKSC 56; also *Rainy Sky* at paras 23-30.

18 See the cases cited at n 7; also in the Supreme Court, *Rainy Sky* at paras 25-30 per Lord Phillips.

19 Macgregor (n 1) at 105.

20 There have also been some positive affirmations in the Inner House of Lord Hoffmann's more generous approach. See *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 at para 670 per Lord Kirkwood and at para 676 per Lord Caplan; *Project Fishing International v CEPO Ltd* 2002 GWD 16-125 and *Simmers v Innes* [2007] CSIH 12.

starting point, the Supreme Court is likely to show more sympathy towards a plea that the ordinary reading of the text does not reflect the intentions of the parties.

In light of this, and given the sums involved, one might expect to see the Bank appeal against the decision of the Inner House. Casting the contextual net wider would surely be to the Bank's advantage. Ironically, it could be argued, in this instance that injustice has been done to the Bank but that, in the overall context, justice has been served. Ultimately, the effect of the decision is that a bank has to give a sizable amount of money to a charity. One might question where the sympathy of the wider public might lie. From a legal perspective, an appeal may stand a reasonable chance of success but there are already indications that the media have picked up on this story.<sup>21</sup> Wider publicity considerations may deter the Bank from pursuing the case further.

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## Liability for Improperly Rejected Contract Tenders: Legitimate Expectations, Contract, Promise and Delict

In *Petition of Sidey Ltd for Judicial Review of a decision of Clackmannanshire Council*,<sup>1</sup> the Court of Session has had occasion to consider matters at the interface of public and private law, and of EU and national law, in relation to potential liability arising from an unsuccessful contract tender. The decision of Lord Brailsford in relation to the public law aspects of the case seems entirely appropriate; the result in relation to the private law aspects of the litigation is rather less satisfying, partly (it will be suggested) because of the failure of the petitioners to put their contract/promissory case as well as they might have, and partly as a result of the somewhat precipitous dismissal of the delictual basis of the case.

### A. THE FACTS OF THE CASE

The petitioners specialise in the manufacture and installation of windows, doors, kitchens and bathrooms. They tendered for a contract advertised by the respondent local authority for the replacement of kitchens and bathrooms in a number of council houses. The contract (estimated at approximately £2.5 million in value)

<sup>21</sup> "Lloyds must pay charity 3.5m", *The Herald* 30 Dec 2011; "Lloyds ordered to pay 3.5m after being sued by charity", *The Scotsman* 30 Dec 2011.

<sup>1</sup> [2011] CSOH 194.



was advertised by the respondents by means of an invitation to tender published on the “Public Contract Scotland” website ([www.publiccontractsscotland.gov.uk](http://www.publiccontractsscotland.gov.uk)) maintained by the Scottish Government. The tendering procedure was to comprise a pre-qualifying stage (during which any interested parties might indicate their interest in the contract) and a subsequent tendering stage. The petitioners entered the pre-qualifying stage and were one of four contractors chosen to go forward to the tendering stage. They subsequently submitted a tender in the required form. The tender documentation made it clear that the contract would be awarded “on the basis of a quality/price assessment”, the stipulated quality/price ratio being 70/30. The tenders submitted were evaluated by the respondents, who took the decision to award the contract to a third party (Pyramid Joinery and Construction Ltd).

Due to a mix-up on the respondents’ part, there was some delay in informing the petitioners that they had not been successful in their tender. Shortly after the petitioners discovered that their tender had been rejected, the respondents formally accepted the offer from Pyramid Joinery. The following day, the petitioners wrote to appeal against the respondents’ rejection of their tender, setting out reasons why they believed their tender to have been incorrectly valued. The respondents replied by stating that the appeal would be considered, and subsequently wrote again stating that, the facts of the appeal having been substantiated, it was now proposed “that the contract be awarded to Sidey Limited”.<sup>2</sup> This letter was characterised by Lord Brailsford as, in effect, an admission that the respondents had erred in not awarding the contract to the petitioners and that “but for that error the petitioners would have been evaluated as the successful bidder in the aforesaid tender process and would have been awarded this contract”.<sup>3</sup> The petitioners initially sought redress against both the Council and Pyramid Joinery, but, on appeal, the Inner House declared such a commercial action incompetent;<sup>4</sup> the petitioners subsequently raised an action for judicial review.

Lord Brailsford pronounced declarator that the respondents acted irrationally and in error of law in not awarding the contract to the petitioners, and put the case out By Order to determine the further implications of this declarator.

## B. ANALYSIS

The law concerning the potential liability of a party for improperly rejecting a contract tender is somewhat complicated, especially where the awarding party is a public body. EU law, UK public law, and private law may all conceivably be relevant, depending upon the specific nature of the contract in question.

Prior to the passing of EU Directive 2004/18/EC, implemented in Scotland in the Public Contracts (Scotland) Regulations 2006, any liability which might arise out of the disputed award of contracts by both public and private parties arose at common

<sup>2</sup> Such a course of action would, of course, have had the effect that the Council was contractually bound to two different parties for the same contract.

<sup>3</sup> See *Petition of Sidey* at para 3.

<sup>4</sup> *Sidey v Clackmannanshire Council* 2010 SLT 607.

law. As the decision of the English Court of Appeal in the 1990 case of *Blackpool & Fylde Aero Club v. Blackpool Borough Council*<sup>5</sup> indicates, prior to 2006 whether the defendant was a public body or a private person, the best remedy available against a party inviting tenders which failed to follow the procedures set out by it for the conduct of the tendering process was likely to be damages for breach of contract (under a so-called “unilateral contract” governing the tender procedure), or, possibly, for negligence (the latter, as discussed below, was dismissed as a possible remedy in the present case). Post-2006, disputes concerning the award of certain public works contracts fall within the statutory regime of the 2006 Regulations; for public works contracts not falling within the Regulations, and for non-public contracts, the common law remedies continue to apply.

A principal limiting factor of the Regulations is that they do not apply to contracts falling below a certain financial threshold. The contract in the present case fell below the relevant threshold, the statutory regime thus being inapplicable. Nonetheless, the Regulations further provide that, even if a contract falls below the threshold, the public authority:<sup>6</sup>

... shall, if required by its general EU obligations, for the benefit of any potential economic operator, ... follow a procedure leading to the award of the contract which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non discrimination and transparency.

Damages are payable for breach of such duty.<sup>7</sup> The fact therefore that the procedures applicable to contracts above the threshold were inapplicable in this case did not mean that the respondents were free to act entirely as they wished, restrained only by the common law: in theory, applicable “EU obligations” might trigger a duty to ensure equal treatment, non discrimination, and transparency. European Court of Justice case law indicates that compliance with such EU obligations is required in contracts with a ‘cross-border interest’.<sup>8</sup> In the present case, Lord Brailsford, having considered this issue, ruled that no cross-border interest arose and thus this particular avenue for recovery by the petitioners was not open.<sup>9</sup>

A second line of attack by the petitioners related to the domestic public law argument that they had a “legitimate expectation” that the procedures stipulated by the respondents of equal treatment and transparency would be adopted in the tendering process. The doctrine of “legitimate expectations” in public law, introduced into English public law by Lord Denning in *Schmidt v Secretary of State for Home Affairs*,<sup>10</sup> and thoroughly examined and applied in Scots law by Lord Reed in *Shetland Islands Council v. Lerwick Port Authority*,<sup>11</sup> holds that a party can have a legitimate expectation in a particular course of conduct by a public body if that party can show

5 [1990] 3 All ER 25.

6 Reg 8(21).

7 Reg 47(8).

8 See *Petition of Sidey* at para 7.

9 Para 13.

10 [1969] 2 Ch 149.

11 [2007] CSOH 5.

that there was made to it a clear and unambiguous representation by the public body, that the representation was relied upon by the party, and that such reliance was to the party's detriment. Beach of such a legitimate expectation entitles the party adversely affected to judicial review of the public authority's detrimental conduct.

Applying this concept of "legitimate expectation" to the case before him, Lord Brailsford held that: (i) the petitioners were entitled to expect that the tender evaluation process would be completed in accordance with the stated process: in issuing the tender documentation in the form it did, the respondents had made what amounted to an unambiguous representation that the tender process would be followed by them;<sup>12</sup> (ii) the petitioners had relied upon the respondents following the process they had set out; and (iii) such reliance had resulted in detriment to the petitioners, "the costs incurred by the prospective tenderer preparing the tender being wasted".<sup>13</sup> Lord Brailsford noted that, in fact, the respondents accepted that they had not followed proper procedures; all that was disputed was the terms of the declarator sought (part of which was a demand that the respondents pay to the petitioners the sum of £382,000, together with interest).<sup>14</sup>

This public law aspect of the case would have been enough to have disposed of the litigation, at least so far as a claim for wasted expenditure was concerned. However, the additional private law contractual and delictual aspects of the case ought not to be neglected, and it is here that the outcome of the court's decision is less satisfying. There is clear English authority that failure to follow the correct procedures set out by a party inviting tenders to a contract can give rise to liability in contract to a disappointed tenderer. A distinction has been drawn in the reported cases between circumstances in which an obligation to award a contract to a specific tenderer has been breached, and those in which only an obligation to consider a tender according to certain procedures (but not to award it to any specific party) has been breached. An example of the former case is *Harvela Investments Ltd v. Royal Trust Co of Canada*,<sup>15</sup> in which the House of Lords held that a party inviting bids for the sale of shares had breached its tendering procedures by awarding the shares to the wrong party: the plaintiff company had made the highest valid bid, and the seller, having undertaken to sell the shares to the highest bidder, was ordered to transfer the shares to the plaintiff. In such cases where a party inviting tenders has included within the invitation to tender an undertaking to contract with a specific party, such an undertaking may be specifically enforced by the relevant party (barring which, damages in the performance measure should be available). In English law, this result is reached through the fiction of a "unilateral contract" governing the tendering process: as Lord Diplock stated in his speech in the case, such a unilateral contract

<sup>12</sup> Para 21.

<sup>13</sup> Ibid.

<sup>14</sup> There is no reference in Lord Brailsford's judgment to what the figure of £382,000 sought represents, though the reasonable inference is that it is the net profit expected by the petitioners from the contract (the sum sought represents approximately 15% of the estimated value of the contract). That sum would not accurately reflect the wasted tender costs sought under the legitimate expectations head of the claim.

<sup>15</sup> [1986] AC 207.

was made “at the time when the invitation was received by the promisee to whom it was addressed”.<sup>16</sup> It did not require any acceptance to create a binding unilateral contractual undertaking. It was, in effect, what would be called a unilateral promise in Scots law, and enforced as such.<sup>17</sup> In the second type of case, no undertaking is made to contract with any specific tenderer: all that the party inviting tenders does is to undertake that it will follow certain procedural steps in considering tenders, such as to give due consideration to all tenders submitted by a certain date and in a certain manner. Such was the position in the *Blackpool* case, mentioned earlier: as the tender of the plaintiff in that case had, although submitted on time, been improperly rejected by the defendant, it had failed to adhere to the proper procedure stipulated in the tendering conditions. That of course, did not necessarily mean that, had it been considered, it would have been accepted; it may or may not have been. Such cases create remedial difficulties. A court is unlikely to force a defendant to contract with the unsuccessful tenderer whose bid has been improperly rejected, or to reduce the contract which was in fact accepted. At best, the unsuccessful tenderer might be able to claim its wasted expenditure or else damages based upon the chance it has lost of being awarded the contract. In *Blackpool*, damages were sought by the plaintiff and were awarded by the court, though there is no indication of how these were to be calculated.

Into which of these two types of case did the present case fall? Even though, as noted earlier, Lord Brailsford remarked in his judgment that, as a matter of fact, had the respondents followed the procedures they had decided upon for considering tenders, the petitioners would have been awarded the contract, the tender documentation did not disclose any undertaking by the respondents to contract with any particular tenderer. All the respondents did was to indicate that the contract would “be awarded on the basis of a quality/price assessment”, the quality/price ratio to be 70/30. Such an undertaking does not seem specific enough to amount to a distinct undertaking to any objectively identifiable tenderer that the contract would be awarded to them: whilst the 30% price element indicates, it can be argued, an objective criterion (the lower the price, the higher the ranking of the bid),<sup>18</sup> on the face of it the 70% quality element suggests a subjective evaluation of

16 [1986] 2 AC 207 at 224.

17 As I have previously argued: see M Hogg, *Obligations*, 2<sup>nd</sup> edn (2006) para 2.42; M Hogg, *Promises and Contract Law: Comparative Perspectives* (2011) 220-221.

18 Lord Brailsford, however, suggests (at para 25) that the economic consideration of the tenders was a subjective matter: “It is less clear that the second part of the contract contended for by the petitioners, that is if awarding a contract at all to award the contract to the person submitting the most economically advantageous tender, would automatically have been accepted by both parties... ‘Economically advantageous’ is a term which is highly likely to be dependent upon the subjective stance of the party considering the question. I would find it difficult to see that parties in the position of the petitioners and respondents would agree on such a subjective term without further definition and qualification.” Put in those terms, his Lordship has a point: “economic advantage” has a subjective ring to it. Yet, the tender documentation did not speak of “economic advantage”; it stated that 30% of the evaluation process was to be based upon “price”, not “economic advantage”. Price is an objectively ascertainable matter, being a specific figure. It is not clear therefore why petitioners’ counsel chose to advance an argument framed in terms of “economic advantage” rather than “price”.

the relative quality of the various bids. If there were to be any remedy available to a disappointed tenderer, therefore, it would have been likely only to have been damages for wasted expenditure or the lost chance of being awarded the contract if the proper procedures for evaluating tenders were not followed (which they were not). However, Lord Brailsford was not even persuaded that an enforceable undertaking of any kind had been given by the respondents. His Lordship narrated that the petitioners had contended that the respondents had (impliedly) undertaken to do two things: (i) to consider all tenders in accordance with the principles of fairness and equality; and (ii) if they awarded a contract at all, to do so to the person submitting the most economically advantageous tender.<sup>19</sup> While he was satisfied that the first part of the undertaking might be implied, he did not believe the second to be something which the parties would have agreed upon without further definition and qualification. That may well be so, but without having undertaken to award the contract to any specific person (which, as argued earlier, for reasons of the subjective evaluation present in the award criterion, it does not seem reasonable to infer the respondents had done), it could surely have been argued that the respondents had impliedly held out that they would, as a bare minimum, evaluate each tender in accordance with the scoring criteria and procedures which they had settled upon.<sup>20</sup> On the reasoning deployed in the *Blackpool* case, such an undertaking would be a unilaterally contractually binding one, or, more consistently with the existence in Scots law of the discrete obligation of unilateral promise, a promise. By the respondent's own admission (in acknowledging that the points made in the petitioners' appeal had been "substantiated"), these criteria and procedures were not followed, and thus it ought, it is suggested, to have been affirmed that the respondents were in breach of a contractual (or unilateral promissory) duty to the petitioners to follow their tendering procedures. Though such a finding was unnecessary to give the petitioner in this case a remedy of some sort (given the prior public law finding of a breach of a legitimate expectation), damages assessed by reference to a lost chance of being awarded the contract would have been much higher. The denial therefore of a claim based upon breach of a unilateral promise to follow tendering procedures not only deprived the petitioners of a more lucrative remedy, but it set an unhelpful precedent for future cases in which a public law remedy may not be available. Unfortunately the petitioners' oral arguments before the court seem to have put their case at a disadvantage: the opportunity both to argue that the undertaking breached was, rather than one to award the contract to a specific party, one to apply pre-determined scoring criteria and procedures properly, and to argue unilateral promise (rather than the English concept of "unilateral contract"), were both missed. Such a failure in the pleadings doubtless constrained what Lord Brailsford was able to do for the petitioners.

The second private law aspect of the case was the petitioner's claim that the respondents had breached a delictual duty owed to the petitioners to take reasonable

<sup>19</sup> See para 24.

<sup>20</sup> Indeed, earlier in his judgment (at para 21), Lord Brailsford had expressly stated that "the respondents, in issuing the tender documentation in the form it did, made what amounted to an unambiguous representation that the tender process would be followed by them".

care to consider the petitioners' tender in accordance with stipulated procedures. Here it does not seem that there was any failing on the petitioners' part to frame their claim correctly; rather, with respect to his Lordship, Lord Brailsford seems to have dismissed the delictual claim somewhat precipitously, without a great deal of consideration of whether the circumstances of the case might meet the tripartite test for the imposition of a duty of care set out in *Caparo Industries v. Dickman plc*.<sup>21</sup> True, in the *Blackpool* case, the Court of Appeal had not thought a tortious approach to liability between a tenderer and a party inviting tenders an especially fruitful avenue to explore,<sup>22</sup> but the matter was not explored in any depth given the court's prior decision to apply a contractual solution to the *Blackpool* facts. Lord Brailsford's doubts about a duty of care being owed to a tenderer stemmed from his belief that the parties were not in a sufficiently proximate relationship: "[t]his was a commercial transaction at which the respective parties were at arms length to each other".<sup>23</sup> This was the full extent of his Lordship's view on the matter of proximity. It deserves greater consideration.

Parties negotiating a commercial contract are doubtless "at arm's length" so far as that term is usually used in contract law, that is to say, being parties to a commercial contract they are (in general terms) entitled to look to their own interests when deciding whether or not to contract and on what terms. That much has been asserted definitively by the House of Lords in *Walford v. Miles*,<sup>24</sup> and in numerous Scottish contract cases. But being "at arm's length" in contract terms does not necessarily mean that negotiating parties cannot harm each other. It is clear, for instance, that such parties may make misrepresentations to each other which can sound in damages in delict, whether or not they enter into a contract with each other. Moreover, if one begins to examine the nature of the relationship of negotiating parties such as those in the present case more closely in the light of the *Caparo* requirements, it becomes clear that a sufficiently proximate relationship may arguably exist for delictual purposes. A party inviting a tender from a specific party (as in this case) has initiated close contact with an identified person; this is not a case of economic loss being caused to conceivably any member of the public, or to a large class of people. The contact initiated includes encouragement to the tenderer to spend considerable time and expense in preparing a tender for a high value contract. Such behaviour is encouraged on the back of implied (if not express) assurances by the party inviting tenders that it will adhere to a stipulated procedure. Such assurances are designed to be relied upon by the tenderer, and are so relied.<sup>25</sup> The party inviting tenders can foresee that, if it does not adhere to these procedures, and improperly rejects the tenderer's bid, this will lead to the expenditure of the tenderer's time and effort being wasted and to the loss of the chance the tenderer has of being awarded the

21 [1990] 2 AC 605.

22 Though it did not reject out of hand the idea that a party inviting tenders might owe a duty of care to a tenderer: see [1990] 3 All ER 25 at 31-32 per Bingham LJ.

23 *Petition of Sidey* at para 26.

24 [1992] 2 AC 128.

25 Lord Brailsford noted that the petitioners in the case before him had "detrimentally relied" on the tender documentation (para 21).

contract. Such considerations (some of which echo those of the successfully pled 'legitimate expectation' basis of this litigation) suggest, it is respectfully submitted, that the question of the proximity (or absence of it) between a tenderer and the party inviting tenders was deserving of greater judicial attention than it received in this case. While such greater judicial attention might still have led to a rejection of the argument as to proximity (as has been the outcome in at least one other jurisdiction),<sup>26</sup> we would at least have had more by way of developed reasons for such a rejection.

It might of course be that something akin to the German doctrine of *culpa in contrahendo* would represent a more appropriate avenue for recovery in this sort of case than either delict or contract/promise, but, as Scots law lacks such a doctrine (albeit that we recognise a very limited remedy for the recovery of wasted pre-contractual expenditure),<sup>27</sup> we must look to other obligations to deal with the perceived inequities which can be caused to tenderers. The facts of *Sidey* are not so obviously unsuited to an implied undertaking in contract or promise, or perhaps to liability in delict, as the outcome of the litigation suggests.

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## Rebalancing Privacy and Freedom of Expression

The recent judgments of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Axel Springer AG v Germany*<sup>1</sup> and *von Hannover v Germany (No 2)*<sup>2</sup> have been hailed as good news for the media. Both cases involved alleged intrusion by the press into the private life of high-profile individuals, and accordingly they entailed the now familiar "balancing exercise" between article 8 of the European Convention on Human Rights, giving the right to respect for private life, and article 10, protecting freedom of expression. In both cases the latter was judged to prevail over the former. Comparisons have been drawn with previous case law in which the outcome for the individual was very different, notably *von Hannover v Germany (No 1)*<sup>3</sup> and the English case, *Campbell v MGN*.<sup>4</sup> So, do these latest cases point to a rebalancing exercise in Strasbourg?

<sup>26</sup> See, for instance, the decision of the Supreme Court of Canada in *Design Services Ltd v Canada* [2008] 1 SCR 737.

<sup>27</sup> See the line of cases based upon *Walker v Milne* (1823) 2 S 379.

<sup>1</sup> App No 39954/08, 7 Feb 2012.

<sup>2</sup> Apps No 40660/08 and 60641/08, 7 Feb 2012.

<sup>3</sup> (2005) 40 EHRR 1.

<sup>4</sup> [2004] 2 AC 457.

### A. BALANCING ARTICLES 8 AND 10: THE KEY PRINCIPLES

A useful feature of the two cases is that the ECtHR took the opportunity to restate the key principles governing the interrelationship between articles 8 and 10:

- 1) The press has an “essential” role as “public watchdog”, meaning that it has a duty to impart, and the public a “right to receive”, “information and ideas on all matters of public interest”.<sup>5</sup> Moreover, journalistic freedom requires that the media should be permitted “possible recourse to a degree of exaggeration, or even provocation”.<sup>6</sup>
- 2) Articles 8 and 10 command “equal respect”. In consequence, it should make no difference to the outcome of applications like those in *Springer* and *von Hannover* whether they are brought under article 10 by the publisher or under article 8 by the individual.<sup>7</sup>
- 3) Contracting States enjoy a margin of appreciation in assessing whether interference with freedom of expression is necessary in terms of article 10(2), but the ECtHR case law demonstrates certain core criteria to be significant, namely:<sup>8</sup>
  - a) whether photos or articles made a contribution to a debate of general interest;
  - b) the extent to which the person concerned was well known, and the nature of the subject matter;
  - c) the prior conduct of the person;
  - d) the method of obtaining the information;
  - e) the content, form and consequences of the publication; and
  - f) the severity of any sanctions imposed.
- 4) A further feature of these cases is their acceptance that although freedom of expression may extend to publication of photos, this is a particularly sensitive area “[P]hotos may contain very personal or even intimate information”,<sup>9</sup> or as Lord Nicholls memorably put it in *Campbell v MGN*: photos “are worth a thousand words”.<sup>10</sup> However, the ECtHR did not demur from the assertion by one of the third party interveners in *von Hannover (No 2)*, the Media Lawyers’ Association, that article 8 of the ECHR “did not create an image right”.<sup>11</sup>

### B. APPLICATION OF THE KEY PRINCIPLES

#### (1) *Springer*

In *Springer*, *Bild* newspaper had published a front-page article about X, an actor well-known for his portrayal of Superintendent Y in a popular television detective series.

<sup>5</sup> *Springer* at paras 79 and 80.

<sup>6</sup> Para 81.

<sup>7</sup> Para 87.

<sup>8</sup> Paras 90-95.

<sup>9</sup> *von Hannover (No 2)* at para 103.

<sup>10</sup> *Campbell* at para 31.

<sup>11</sup> *von Hannover (No 2)* at para 92. Other third parties included the Association of German Magazine Editors, the Media Legal Defence Initiative, the International Press Institute and the World Association of Newspapers and News Publishers.



The article, accompanied by three photos, reported his arrest by police at the Munich Beer Festival after he had been found to be in possession of cocaine. A second article some months later described X's confession and his criminal prosecution. X did not dispute the essential facts narrated by the newspaper, but sought to prevent future publication of the material. In both instances, the domestic courts granted injunctions and in the second they ordered payment of a penalty. *Springer*, the publisher of *Bild*, applied to the ECtHR arguing that these decisions interfered with its right to freedom of expression under article 10.

On application of the key principles as noted above, the court held that by and large "public judicial facts" did "present a degree of general interest",<sup>12</sup> and that X was a sufficiently well-known actor to qualify as a public figure.<sup>13</sup> He had previously "sought the limelight" by volunteering details of his private life in interviews, and so his "legitimate expectation" of privacy was "henceforth reduced".<sup>14</sup> In relation to criterion 3d), the court found that the publisher had not been entirely straightforward in claiming it had obtained the essentials of the story from a press conference held by the public prosecutor. Nevertheless, the public prosecutor had confirmed its truth, leading the publisher to believe disclosure was lawful. The publisher's "liability did not extend beyond minor negligence," and it had not been shown that it had acted in "bad faith".<sup>15</sup> The articles had contained journalistic language to attract public attention but no "disparaging expression or unsubstantiated allegation", and the newspaper coverage thus far had not been demonstrated to have had adverse consequences for X.<sup>16</sup> An injunction, on the other hand, was capable of exerting a "chilling effect"<sup>17</sup> on the newspaper. Accordingly, notwithstanding the margin of appreciation allotted to the domestic courts in making their assessment, the court ruled that the publisher's right to exercise freedom of expression should have prevailed over X's right to protect his private life from press intrusion. There had been a violation of article 10.

The decision was not, however, unanimous. A dissenting opinion by five of the judges recorded their concern that the court should not assume the role of competent national courts as a "fourth instance" in determining the merits of individual cases, and that their scrutiny should be confined to determining whether "the relevant criteria established in our case-law" had been considered "without any manifest error or omission".

## (2) *von Hannover* (No 2)

In *von Hannover* two German magazines had published photos of Princess Caroline von Hannover of Monaco and her husband, Prince Ernst August, taken while they were on a skiing holiday. An injunction was sought against further publication. The first two photos had shown the royal couple taking a walk through St Moritz and travelling on a chairlift. A third photo, similarly of them walking in St Moritz, had

<sup>12</sup> *Springer* at para 96.

<sup>13</sup> Para 98.

<sup>14</sup> Para 101.

<sup>15</sup> Para 107.

<sup>16</sup> Para 108.

<sup>17</sup> Para 109.

been used as background for an article reporting on the failing health of the Princess's father, the elderly Prince Rainier, and the strains this imposed upon his family. The German domestic courts had granted an injunction with respect to the first two photos, but not with regard to the third. The applicants argued before the ECtHR that their right to respect for their private lives in terms of article 8 had thereby been violated.

The judgment in *von Hannover (No 2)*, released the same day as that in *Springer*, invoked exactly the same criteria to inform the article 8/article 10 balancing exercise. The ECtHR endorsed the reasoning of the domestic courts that the first two photos served entertainment purposes alone, since details of the couple's holiday arrangements did not contribute to a debate of general public interest. However, since the subject of the article accompanying the third photo had been the illness of Prince Rainier, sovereign of Monaco, the ECtHR concurred with the German courts that this was "an event of contemporary society" on which the press was free to report, and it did not question the use of a tenuously-related photo to illustrate that story.<sup>18</sup> The fact that the photos had been taken without the couple's knowledge did not entail that they were taken "surreptitiously" in conditions unfavourable to them.<sup>19</sup> In contrast to *von Hannover (No 1)*, the court was not persuaded that this was against a background of a "climate of continual harassment" of the Princess by the press.<sup>20</sup> Moreover, shots of the couple in a public street in St Moritz were not in themselves "offensive".<sup>21</sup> Accordingly, in refusing an injunction, the domestic courts had not failed to comply with their obligations under article 8 to protect the applicants' private lives. There was no dissenting opinion.

### C. ANALYSIS

Clearly the core criteria applied by the ECtHR were nothing new. They are already established in the court's jurisprudence, and are indeed substantially replicated in the balancing exercise now carried out by the English courts.<sup>22</sup> But while it is of the nature of such factors that their balancing cannot be an exact science, the ECtHR has interpreted them here in such a way as to indicate a perceptible shift towards freedom of expression. Perhaps most notably these judgments suggest an expansive reading of the key concepts of "a debate of general interest" and "public figure".

A debate of general interest is no doubt capable of extending to matters of law enforcement, and a well-known actor's arrest on criminal charges can be seen as relevant to this, but it is curious that the court in *Springer* also took into account the nature of X's television character – a police detective – as reinforcing "the public's interest in being informed of X's arrest for a criminal offence".<sup>23</sup> (Indeed one wonders how far such reasoning could be extended. Is disclosure of a medical condition more

18 *von Hannover (No 2)* at para 118.

19 Para 121.

20 Contrast *von Hannover (No 1)* at para 59 with *von Hannover (No 2)* at para 121.

21 *von Hannover (No 2)* at para 123.

22 See e.g. *McKennitt v Ash* [2008] QB 73.

23 *Springer* at para 99.

readily to be tolerated where the patient plays a doctor in a television series, for example?) This seems to be a straightforward example of a feature which increased the *public's interest* in the story but which had little bearing on its *public interest* value as such.

Perhaps more intriguing, however, is the court's acceptance that a photo of the von Hannovers at a ski resort might contribute to a debate of general interest on the governance of Monaco "at least to some degree". In *von Hannover (No 1)* it was held that:<sup>24</sup>

...the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

On that basis photos of the Princess and her family in a variety of locations, including public places, were held to contravene article 8, notwithstanding her status within the reigning family of Monaco. By contrast, *von Hannover (No 2)* seems to indicate recognition that the slenderest of threads can provide a connection to a debate of general interest.

A related consideration in these recent cases is a less differentiated treatment of "public figures" as compared with that in earlier rulings. It was perhaps uncontentious in *Springer* that actor X should be classed as a public figure and that his previous "courting" of the media had a bearing on his expectation of privacy (just as it had for fashion model Naomi Campbell in *Campbell v MGN*). Conversely, the fact that the applicants in *von Hannover (No 2)* had actively discouraged media attention counted for little. This again contrasts with *von Hannover (No 1)*, in which the ECtHR had been careful to distinguish between media coverage of "politicians in the exercise of their functions"<sup>25</sup> and the private life of a public figure like the Princess, who did not exercise official functions. The press had an essential role to inform the public in relation to the former but not the latter.<sup>26</sup> In *von Hannover (No 2)* the court did not trouble over this distinction, burying it under the general observation that, irrespective of the Princess's official functions, she and her husband were not ordinary private individuals and should be regarded as "public figures".<sup>27</sup> On this basis, even individuals who have become "celebrities" unwillingly must find their expectation of privacy diminished.

A further indication of a shift in emphasis is the ECtHR's relatively lenient approach to the photographs having been taken without consent, even by use of

<sup>24</sup> *von Hannover (No 1)* at paras 76-77.

<sup>25</sup> *von Hannover (No 1)* at para 63.

<sup>26</sup> *Ibid.*

<sup>27</sup> Para 120.

a degree of subterfuge. Whereas in *von Hannover (No 1)* the court attributed considerable significance to the applicant's ignorance that photos were being taken, in *Springer* it was prepared to overlook "minor negligence" in the gathering of information where the newspaper could not be shown to have "acted in bad faith".<sup>28</sup> However, it remains to be seen how far such "minor negligence" may be tolerated in the English courts, where the vehicle for protection of private life is misuse of private information. Since this tort has, in turn, evolved out of breach of confidence, the right to protect private information is underpinned by a correlative "duty of confidence," arising "whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential".<sup>29</sup> Such constructive knowledge has in the past been readily imputed to opportunist photographers in leading cases such as *Campbell v MGN*, *Douglas v Hello*,<sup>30</sup> and *Murray v Express Newspapers*.<sup>31</sup> Given the recent adverse publicity surrounding unethical methods of newsgathering,<sup>32</sup> the English courts may not easily change their approach.

Finally, the ECtHR in *Springer* stipulated that in order for article 8 to come into play, an attack on a person's reputation "must attain a certain level of seriousness".<sup>33</sup> This is uncontroversial. But it added that "article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence".<sup>34</sup> Given that most aspects of private life, bar illness, are a "foreseeable consequence of one's own actions", the logical result of this curious assertion is that article 8 would cease to be relevant to most forms of truthful disclosure. It seems unlikely that this was the court's intention and it is to be hoped that this statement is qualified before too long.

In short, these latest European judgments leave intact the structure improvised by the English Common Law for the tort of misuse of private information, and the key criteria applied by the ECtHR broadly correspond with those already accepted in the English courts. However, there has been a discernible degree of realignment towards freedom of expression at the expense of respect for private life. When the Scottish courts eventually come to hear such cases, they will be bound to follow the principles laid down in Strasbourg. Whether they will appropriate English structures to give these principles effect is another question entirely.

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<sup>28</sup> Para 107.

<sup>29</sup> *Campbell* at para 14 per Lord Nicholls.

<sup>30</sup> [2008] 1 AC 1.

<sup>31</sup> [2009] Ch 481.

<sup>32</sup> Notably, the evidence put before the Leveson Inquiry, available at <http://www.levesoninquiry.org.uk/>.

<sup>33</sup> *Springer* at para 83.

<sup>34</sup> *Ibid*, citing *Sidabras and Džiautas v Lithuania* (2006) 42 EHRR 6 (cases involving disclosure of the applicants' past as KGB officers).

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## Non-Established Church Property in Scotland: The Sleat Appeal

In 2009 judgment was given in a case involving the Free Church of Scotland and the Free Church of Scotland (Continuing)<sup>1</sup> which was commented on in this journal.<sup>2</sup> Dissatisfied with the outcome the unsuccessful party, the Free Church of Scotland (Continuing), appealed<sup>3</sup> and this note concerns the outcome of the appeal.

### A. THE BACKGROUND

At issue was the continued occupation and use by the Free Church of Scotland (Continuing) (“FCC”) of property consisting of a church and a manse at Broadford on the Isle of Skye, now known as Sleat and Strath Free Church. That property had been donated to the Free Church in 1869 by a feu charter which constituted the trust under which the property was held. The FCC came into being in 2002 when a number of ministers and other members of the Free Church, being dissatisfied with the outcome of proceedings in the Free Church General Assembly concerning the conduct of a professor at the Free Church College in Edinburgh, separated themselves from that church. One of the seceding ministers was the Free Church minister at Broadford. However, he and his congregation continued to occupy the manse and to use the church buildings at Broadford. The minister retired in 2007.

In 2005 the FCC had attempted, and failed, to secure the central assets of the Free Church on the basis that they represented the *true* Free Church.<sup>4</sup> By contrast, the 2009 case<sup>5</sup> involved the assertion of the Free Church of property rights under the particular trust that applied to the Broadford properties. At first instance their claim succeeded, and the FCC appealed. The Inner House constituted an Extra Division to hear the appeal. Lords Osborne and Drummond Young delivered lengthy and exhaustive opinions and Lord Bonomy concurred with his colleagues. The appeal was refused.

### B. THE DECISION

Both Lords Osborne and Drummond Young carefully analysed a long line of previous church property cases, including an unreported case on a manse property in Inverness, drawing out their reasoning and relevant background circumstances.

1 *Smith v Morrison* [2009] CSOH 113.

2 F Lyall, “Non-Established Church Property in Scotland: A Further Case” (2010) 14 EdinLR 113.

3 *Smith v Morrison* [2011] CSIH 52.

4 *Free Church of Scotland (Continuing) v General Assembly of the Free Church of Scotland* [2005] CSOH 46, 2005 SC 396. The pursuers’ argument mirrored that in the 1904 “Free Church case”, *Bannatyne v Overtoun* (1904) 7 F (HL) 1, in which adherence to “original principles” was determinative.

5 *Smith v Morrison* [2009] CSOH 113.

In brief, their conclusion was that in such cases the determining factor lies in the particular terms of the trust under which church property is held. The parties were not divided in theology and, within their separate existences, followed the same practices and procedures, which were and are those of the pre-2001 Free Church. However, the titles provided for the property to be held in trust for those acting in accordance and complying with the institutional structures and procedures of the Free Church. By setting up their own structure, the members of the FCC had institutionally separated themselves from that church. Under these circumstances it was clear that title to the property remained that of the Free Church, which included entitlement to its occupation.

### C. COMMENT

Apart from the discussion of the law, which, though extensive, seems simple, this decision intrigues. The constituting of an Extra Division to hear the case, together with the depth and length of the main judgments, raises the suspicion that the Court of Session may be preparing for (or attempting to discourage) the emergence of cases should the Church of Scotland split on the current question of active homosexuality in the ministry, and should recourse be made to the reasoning of the 1904 Free Church case.<sup>6</sup> The last paragraph of Lord Drummond Young's judgment points out that different Christian denominations have cooperated even in the face of doctrinal divergence. Perhaps, he suggests, given the lack of doctrinal difference in the Sleat case, the disputants should consider cooperation. This case (and extrapolation from Drummond Young's comments) makes one wonder whether any split in the Church of Scotland would or should best be resolved by an orderly disentanglement of property, based on an acceptance of divergent doctrinal conviction, and subsequent cooperation, rather than resort to legal dispute. Church property cases feel wrong. "Dare any of you go to law with one another?" (I Corinthians 6:1).

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<sup>6</sup> See F Cranmer, "Human sexuality and the Church of Scotland: *Aitken et al v Presbytery of Aberdeen*" (2009) 11 Ecclesiastical LJ 334. For details of the Free Church case see Lyall (n 2).